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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, PETITIONER

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	6
Argument:	
Introductory	7
I. Under the applicable decisions of this Court, the debt due to the United States is entitled to priority in payment over the landlord's lien	9
1. The debt secured is not specific	18
2. The goods subject to the lien are not specific	18
II. The lien of the City of Danville for taxes is not entitled to priority as against the claim of the United States	22
III. Recognizing liens of the character involved in the instant case as superior to the priority conferred on the United States by R. S. 3466 would improperly permit states to substitute their own priority scheme for that directed by Congress	24
Conclusion	28
Appendix	29

CITATIONS

Cases:	
American Exchange Bank v. *Goodlee R. Corp.*, 135 Va. 204	16, 17, 19
Atlantic Ins. Co. v. *Conard*, Fed. Cas. No. 627	11
Beaston v. *Farmers' Bank*, 12 Pet. 102	10, 11
Bradford v. *Graham*, 287 Fed. 686	21
Bramwell v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483	25
Brannon, In re, 62 F. (2d) 959	21
Brent v. *Bank of Washington*, 10 Pet. 596	10, 11, 12
Carey v. *Keith, Inc.*, 250 N. Y. 216	14
Chambers v. *Higgins*, 169 Va. 345	23
Conard v. *Atlantic Insurance Co.*, 1 Pet. 386	10, 11, 12
Conard v. *Nicoll*, 4 Pet. 291	10
Conard v. *Pacific Insurance Co.*, 6 Pet. 262	10
Decker v. *Decker Building Material Co.*, 118 N. J. Eq. 177	24
Dime Deposit Bank v. *Wescott*, 113 Va. 567	19

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Cases—Continued. Page

Dingess-Rum Coal Co. v. *Draper Eagle Coal Co.*, 108 W. Va. 37 ... 19
Drewry v. *Baugh and Sons*, 150 Va. 394 ... 23
Dudley's Case, Fed. Cas. No. 4114 ... 11
Emory v. *St. James Distillery*, 143 S. W. (2d) 318, reversed, *United States* v. *Emory*, 314 U. S. 423 ... 26
Ernst v. *Guarantee Millwork, Inc.*, 200 Wash. 195 ... 26
Ferris v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232 ... 27
Field v. *United States*, 9 Pet. 182 ... 9, 10, 17, 25
Fishburne v. *Engeldove*, 91 Va. 548 ... 20
Geiger's Adm'r v. *Harman's Ex'r*, 44 Va. 130 ... 19
Gerson v. *Shubert Theatre Corp.*, 7 F. Supp. 399 ... 15
Grant Co. v. *Snead*, 37 F. (2d) 705 ... 21
Gurfein v. *Howell*, 142 Va. 197 ... 20
Hancock v. *Whitehall, Etc. Co.*, 100 Va. 443 ... 18, 20
Hogan v. *Callas*, 139 Va. 137 ... 18, 20
Kelly v. *Worsham*, 160 Va. 275 ... 19
Lillie Laurie, The, 50 Fed. 219 ... 12
Lincoln Chair & Novelty Co., Matter of, 274 N. Y. 353 ... 15, 24
Marshall v. *New York*, 254 U. S. 380 ... 14
Michigan v. *United States*, 317 U. S. 338 ... 9, 17, 25
Mosby v. *Leeds*, 3 Call. 439 (7 Va. 380) ... 19
Nathan v. *Giles*, 5 Taunt. 558 ... 12
New Orleans, City of v. *Harrell*, 134 F. (2d) 399 ... 21
New York v. *Maclay*, 288 U. S. 290 ... 6, 8, 9, 11, 12, 13, 14, 21, 22, 24, 25
New York Terminal Co. v. *Gaus*, 204 N. Y. 512 ... 14
North River Coal & Wharf Co. v. *McWilliams Bros., Inc.*, 59 F. (2d) 979 ... 14
People of New York v. *United States*, 106 F. (2d) 210 ... 15
Piedmont Corp. v. *Gainesville & N. W. R. Co.*, 30 F. (2d) 525 ... 26
Postmaster General v. *Robbins*, Fed. Cas. No. 11314 ... 11
Price v. *United States*, 269 U. S. 492 ... 7, 8
Prince v. *Bartlett*, 8 Cranch 431 ... 10
Prudence Corp. v. *Geist*, 316 U. S. 89 ... 26
Reese, Claude D., Inc. v. *United States*, 75 F. (2d) 9 ... 21
Savings Society v. *Multnomah County*, 169 U. S. 421 ... 10, 11
Sola Electric Co. v. *Jefferson Co.*, 317 U. S. 173 ... 26
Spokane County v. *United States*, 279 U. S. 80 ... 9, 12, 13, 17, 21, 25
Spokane Merchants' Ass'n v. *State*, 15 Wash. (2d) 186 ... 24, 26
State v. *Wynne*, 134 Tex. 455 ... 27
Thelusson v. *Smith*, 2 Wheat. 396 ... 6, 9, 10, 11, 12
Tropical Printing Co. v. *Union Title Guarantee Co.*, 180 La. 702 ... 24
U. S. F. & G. Co. v. *Sweeney*, 80 F. (2d) 235 ... 21
United States v. *Canal Bank*, Fed. Cas. No. 14715 ... 10

Cases—continued. Page

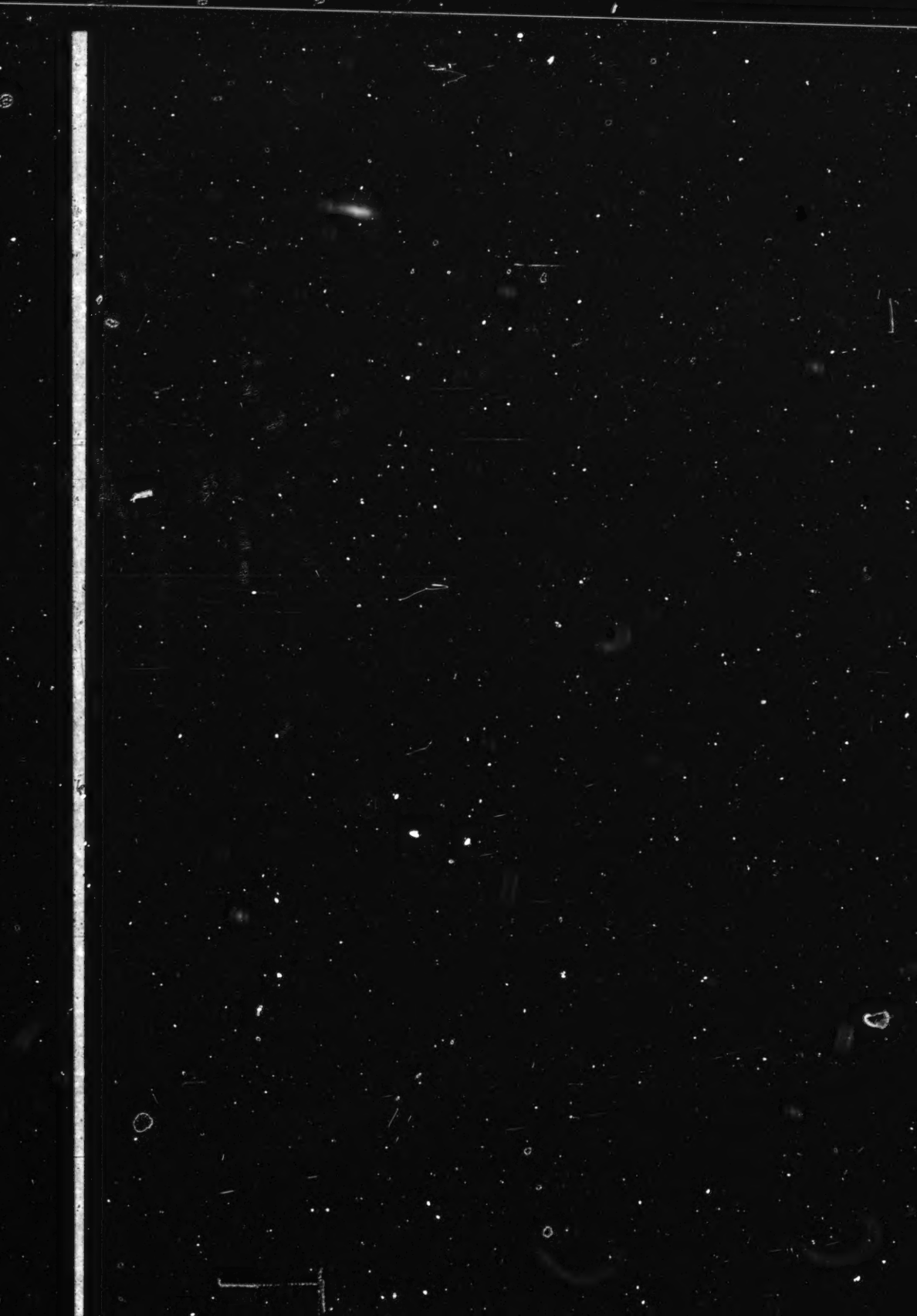
United States v. *Duncan*, Fed. Cas. No. 15003 ... 11
United States v. *Emory*, 314 U. S. 423 ... 8, 17, 21, 24
United States v. *Hooe*, 3 Cranch 73 ... 10
United States v. *Knott*, 298 U. S. 544 ... 13, 15
United States v. *Oklahoma*, 261 U. S. 253 ... 8, 9, 17, 25
United States v. *Reese*, 131 F. (2d) 466 ... 21
United States v. *State Bank of North Carolina*, 6 Pet. 29 ... 25
United States v. *Summerlin*, 310 U. S. 414 ... 8
United States v. *Texas*, 314 U. S. 480 ... 6, 8, 9, 10, 11, 12, 13, 15, 18, 20, 21, 22, 24, 25
Vandewater v. *Mills*, 19 How. 82 ... 12
Wades v. *Figgatt*, 75 Va. 575 ... 18
West Coast Power Co. v. *So. Kansas Gas Co.*, 20 Del. Ch. 130 ... 24
West Side Paper Co., In re, 162 Fed. 110 ... 27
Wickham v. *Richmond Spike Co.*, 107 Va. 44 ... 20
Williamson v. *Payne*, 103 Va. 551 ... 23

Statutes:

Act of 1748, c. 15, secs. 5, 6 (Va. Laws 1752) ... 16
Act of March 3, 1797, sec. 5 (1 Stat. 515) ... 7
Act of March 2, 1799, sec. 65 (1 Stat. 676) ... 7, 6
Act of 8 Anne, c. 14, sec. 1 ... 16
Revised Statutes, sec. 3466 (31 U. S. C. sec. 191) ... 7, 29
1 Virginia Revised Code (1819) p. 448 ... 16
Virginia Code (1887), sec. 2792 ... 16, 17
Virginia Code (1919), sec. 5524 ... 16
Virginia Code of 1936:
  Sec. 5519 ... 16, 29
  Sec. 5519–5523 ... 20
  Sec. 5522 ... 30
  Sec. 5523 ... 16, 19, 30
  Sec. 5524 ... 16, 19, 31
  Sec. 5527 ... 20, 32
  Sec. 5528 ... 20, 33
  Sec. 5783 ... 20, 33
  Sec. 6518 ... 34
  Sec. 6519 ... 20, 34
Virginia Code (1942) sec. 5524 ... 16

Miscellaneous:

II Jones, Liens, secs. 1676 *et seq.* ... 12



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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Corporation Court of the City of Danville, Virginia (R. 26–34) is unreported. The opinion of the Supreme Court of Appeals of Virginia (R. 36–44) is reported in 182 Va. 351.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on January 24, 1944 (R. 45). The petition for a writ of certiorari was filed on April 24, 1944, and was granted on May 29, 1944 (R. 46). The jurisdiction of this Court

rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a state proceeding under a general assignment for benefit of creditors, a landlord's lien for six months' rent due and to become due, and the lien of a municipality for unpaid taxes, both created by state law, take precedence in payment over a debt due the United States, the prior payment of which is directed by Section 3466 of the Revised Statutes.

STATUTES INVOLVED

Section 3466 of the Revised Statutes, and the applicable portions of the Virginia statutes involved, are set forth in the Appendix, *infra*, pp. 29–35.

STATEMENT

Mrs. Oeland Roman was doing business under the trade name of Roman's Restaurant, Danville, Virginia, on premises leased from respondent Waddill, Holland & Flinn, Inc. (R. 15). On June 19, 1941, Mrs. Roman executed a general deed of assignment to a trustee for the benefit of creditors (R. 15–17), specifically conveying all personal property, fixtures, and equipment used by the assignor in the conduct of the restaurant and located on its premises (R. 15, 26–27). The property assigned was duly sold by the trustee, and after the deduction of appropriate administrative

expenses, there remained the sum of $1,407.29 (R. 28). Aside from debts due to general creditors, the assignor was indebted to the following, each of whom claimed priority of payment in the amounts respectively set forth:

(1) The United States, $1,559.63, plus interest;[1]

(2) Virginia Unemployment Compensation Commission, for taxes for 1940 and 1941, $66.38, plus interest;

(3) City of Danville, for personal property taxes for 1939–1941, $300.55; and

(4) Waddill, Holland & Flinn, Inc., six months' rent due and to become due, $1,500.00. (R. 27–28.)

The assignor's lease from Waddill, Holland & Flinn ran for a period of five years beginning January 1, 1937, at a monthly rental of $250.00 (R. 27). On July 1, 1941, 12 days after the deed of assignment was executed, the landlord obtained the issuance of a distress warrant for 3⅗ months' past due rent amounting to $850, and an attachment for 2⅗ months' future installments of rent amounting to $650 (R. 25, 28); on the same day

[1] The sum of $1,559.63 was comprised of the following items: Federal Unemployment Compensation taxes for the year 1940, $209.30; like taxes for the year 1941, $71.70; and a debt arising out of a Federal Housing Administration transaction, $1,278.63 (R. 27). No controversy exists as to the correctness of these amounts or that they were due and owing to the United States prior to the date when the assignment was made.

the landlord levied the warrant and attachment on the assignor's property located on the leased premises (R. 22, 27). On July 2, 1941, the City Collector of Danville distrained all of the property on the leased premises for personal property taxes amounting to $301.45 due from the assignor to the City of Danville for the years 1939–1941, comprising $226.81 due on the furniture, fixtures, and merchants' capital of the restaurant, and $74.64 due on other personal property (R. 23).

On April 20, 1942, the trustee under the general assignment filed a petition in the Corporation Court of Danville, Virginia, in which he recited the various claims for priority and requested advice as to the proper distribution to be made of the funds in his hands (R. 9–13). The landlord answered, claiming priority in payment over all other claims against the fund "by virtue of the levy of said attachment and distress warrant" against the property of the assignor on the leased premises (R. 22). The Unemployment Compensation Commission of Virginia, an instrumentality of the Commonwealth of Virginia, answered, admitting the priority of the United States but claiming priority over both the City of Danville and the landlord (R. 23–24). The United States answered, claiming priority over all other claimants (R. 24–25). On January 5, 1943, the Corporation Court of Danville entered judgment, holding that the landlord was entitled to priority in pay-

ment over the debts due the United States and the Unemployment Compensation Commission of Virginia but that its claim was subordinate to that of the City of Danville for taxes in the sum of $222.31 (R. 34–35). The Corporation Court concluded that a municipal tax assessed against specific chattels, such as furniture and equipment, was a paramount and specific lien as a matter of state law (R. 33). In computing the amount of the city's taxes entitled to priority, it deducted from the total taxes of $301.45 the tax of $4.50 assessed on merchants' capital ($1.50 for each of the three years in question) and the tax of $74.64 assessed on other personal property of the assignor, apparently on the ground that they were not specific liens (R. 28, 33). The United States appealed to the Supreme Court of Appeals of Virginia (R. 1–9), which affirmed the distribution ordered by the Corporation Court (R. 36–44).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

(1) In holding that under R. S. 3466, a debt due the United States is subordinate in payment to a landlord's claim for rent which under Virginia law is secured by a lien upon the debtor's property.

(2) In holding that a landlord's lien for rent under Virginia law upon personal property on the leased premises, even without levy of distress or

attachment, entitles the landlord to priority out of the proceeds of such property, as against a debt due to the United States.

(3) In failing to hold that under R. S. 3466 and this Court's decisions thereunder, the debt due the United States is entitled to priority over the claim of the landlord for rent and the claim of the City of Danville for taxes.

SUMMARY OF ARGUMENT

I

This Court has never sustained, over the priority conferred upon the United States by R. S. 3466, the claim of any creditor not having title to or possession of the property as to which he asserts priority. Cf. *Thelusson* v. *Smith*, 2 Wheat. 396. It has consistently declared that to prevail the lien must at least be "specific and perfected." Upon analysis of the attributes given by Virginia law to the statutory lien here asserted, it is apparent that the lien is no more "specific and perfected" than those in *New York* v. *Maclay*, 288 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480, which were held inferior to the claim of the United States. Thus neither the amount secured by the landlord's lien nor the property to which it attaches is specific, and the lien is enforceable by proceedings judicial in character.

II

The same considerations attach to the city's tax lien. That lien likewise fails to attach to specific

property and cannot take precedence over the priority of the United States.

III

A state statute declaring the order of priority of payment of various classes of creditors cannot disregard the command of R. S. 3466. We submit that a state cannot achieve the same results by indirection merely by using the terminology of lien. The declaration of a statutory lien, such as those here asserted, which is neither specific nor perfected and involves no transfer of title or possession, amounts in effect to no more than a declaration by the state of the order of priority, which cannot override the contrary priority prescribed by R. S. 3466.

ARGUMENT

Introductory.—Section 3466 of the Revised Statutes (31 U. S. C. 191), *infra*, p. 29, provides that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States, "not having sufficient property to pay all his debts, makes a voluntary assignment thereof."[2] Here, Mrs. Ronan, being a debtor to the United States and not having sufficient property to pay all her

[2] This provision was derived from Section 5 of the Act of March 3, 1797 (1 Stat. 515) and Section 65 of the Act of March 2, 1799 (1 Stat. 676). For earlier legislation on the subject, see *Price* v. *United States*, 269 U. S. 492, 500–501.

debts, made a voluntary assignment of her property for the benefit of creditors.

While recognizing that the right of the United States to priority under R. S. 3466 became fixed at the date of the assignment (*United States* v. *Oklahoma*, 261 U. S. 253, 260), and that other claimants, if not preferred at that time, could not thereafter obtain a preference (*New York* v. *Maclay*, 288 U. S. 290, 293; *United States* v. *Texas*, 314 U. S. 480, 486), the court below held that under Virginia law a landlord has a "fixed and specific" lien for six months' rent against all property of the tenant located on the leased premises, irrespective of attachment or distraint;[4] that the trustees took the assignor's property subject to that lien, which continued to attach to the proceeds of the property; and that the landlord was entitled to payment out of such proceeds ahead of the United States. The court further held that the claim of the City of Danville for taxes

[3] It was not questioned at any stage of the proceedings below that the claims of the United States here involved (see fn. 1, *supra*, p. 3) are "debts due to the United States" within the meaning of R. S. 3466, both in respect of the taxes (*Price* v. *United States*, 269 U. S. 492) and the Federal Housing Administration claims (*United States* v. *Summerlin*, 310 U. S. 414; *United States* v. *Emory*, 314 U. S. 423). Nor was it questioned that the nature of the assignment was such as to render R. S. 3466 applicable.

[4] Since the doctrine of relation back may not be applied in derogation of R. S. 3466 (*New York* v. *Maclay*, 288 U. S. 290, 293), the court below correctly held that the landlord's subsequent distraint and attachment added nothing to the claims of the landlord and the city *vis-à-vis* the United States (R. 38).

was, as a matter of Virginia law, superior to the landlord's claim, but it found it unnecessary to determine whether the city's claim was superior to that of the United States, since the landlord's claim would exhaust all available funds. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 91.

We submit that the decision of the court below, subordinating the claim of the United States to those of the landlord and municipality, is contrary to the decisions of this Court in *Thelusson* v. *Smith*, 2 Wheat. 396; *New York* v. *Maclay*, 288 U. S. 290; and *United States* v. *Texas*, 314 U. S. 480. We further submit that the decision of a state court as to the type of lien which a landlord possesses under state law and the rights which he acquires thereby, is not controlling in determining whether the lien is superior to the priority conferred on the United States by R. S. 3466. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 90; cf. *Michigan* v. *United States*, 317 U. S. 338, 340.

I

UNDER THE APPLICABLE DECISIONS OF THIS COURT, THE DEBT DUE TO THE UNITED STATES IS ENTITLED TO PRIORITY IN PAYMENT OVER THE LANDLORD'S LIEN

In considering the scope of the priority conferred upon the United States by Section 65 of the Act of March 2, 1799 (which thereafter became

R. S. 3466), this Court early held the United States entitled to priority over a creditor having an earlier judgment lien, and declared that the words of the statute "are as general as any which could have been used" and give the Government's claim preference over "all debts due [from a debtor of the United States] to individuals, whatever may be their dignity." *Thelusson* v. *Smith*, 2 Wheat. 396, 425; see also *United States* v. *Texas*, 314 U. S. 480, 484. The only exception which the *Thelusson* case recognized to the absolute priority of the United States was as to property which, because it had in good faith been conveyed, mortgaged, or seized under a *fieri facias* before the preference of the United States accrued, could be said to be no longer part of "the debtor's estate" (*ibid.*).

Other cases have accordingly held that a mortgagee[5] and a prior attaching creditor[6] are entitled to prior satisfaction out of the mortgaged or attached property. These exceptions are based upon the theory that there has been an actual conveyance or divestment of the mortgaged or attached property of the debtor prior to the accrual of the Government's preference. See *Conard* v.

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[5] *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386; *Conard* v. *Nicoll*, 4 Pet. 291; *Conard* v. *Pacific Insurance Co.*, 6 Pet. 262; see *United States* v. *Hooe*, 3 Cranch 73, 90; *Field* v. *United States*, 9 Pet. 182, 201; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611–612; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428.

[6] *Prince* v. *Bartlett*, 8 Cranch 431; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 135–136; *United States* v. *Canal-Bank*, Fed. Cas. No. 14715 (D. Me. 1844).

Atlantic Insurance Co., 1 Pet. 386, 441; *Brent* v. *Bank of Washington*, 10 Pet. 596, 612; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 136; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428. In *New York* v. *Maclay*, 288 U. S. 290, 293–294, the mortgage cases were so explained, and doubt was expressed whether the result would be the same in jurisdictions where a mortgage is regarded as creating a lien only. And in *United States* v. *Texas*, 314 U. S. 480, 484, 485, 486, the mortgage cases were described as "an exception" to the command of R. S. 3466 whose "current vitality" was considered open to question.[7]

[7] Some early circuit court decisions have suggested that *Thelusson* v. *Smith* may have been overruled or disapproved by *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, and *Brent* v. *Bank of Washington*, 10 Pet. 596. See *Dudley's Case*, Fed. Cas. No. 4114 at pp. 1154–1155 (E. D. Pa. 1842); *United States* v. *Duncan*, Fed. Cas. No. 15003 at pp. 935–936 (D. Ill. 1850); cf. *Postmaster General* v. *Robbins*, Fed. Cas. No. 11314 at p. 1127 (D. Me. 1829). Neither case is inconsistent with the *Thelusson* case. The *Conard* case, which affirmed a decision at circuit (*Atlantic Ins. Co.* v. *Conard*, Fed. Cas. No. 627 (D. Pa. 1827)) by Mr. Justice Washington, the author of the opinion in *Thelusson* v. *Smith*, involved an assignment of bills of lading which was held operative to pass equitable title to the goods and thus to place the creditor in the position of a mortgagee. The *Brent* case was a suit by executors of the debtor to compel a creditor bank to transfer to them on its books shares of its stock owned by the debtor. The decision was rested on the power of the bank under its charter to refuse to transfer the stock until the debts due it were paid; the bank was accordingly in a position analogous to that of a lienor in possession, and the priority of the United States was held not to attach because the stock never came into the hands of the debtor's executors.

Whatever may be the rule as to mortgages, if regarded as conveyances, this Court has consistently reserved the question whether a specific, perfected lien, accompanied by possession, can prevail over the Government's statutory priority. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Spokane County* v. *United States*, 279 U. S. 80, 91; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480. It has never sustained, against the priority of the United

Nothing said in either case casts doubt upon the decision in *Thelusson* v. *Smith*. The *Brent* case merely reserves the question whether the Government's priority will defeat a general or specific lien. And the discussion in the *Conard* case is addressed primarily to the contention, there advanced, that the statutory priority of the United States is "superior to any lien; and even to an actual mortgage" (1 Pet. at p. 441). *Thelusson* v. *Smith* was held not to support that broad contention, the Court pointing out that the *Thelusson* case itself reserved the case of a mortgage, and adding that "it has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possesion or not" (1 Pet. at p. 441). In support of its further statement (p. 442) that "before such decision is made, it will deserve very grave deliberation," the Court cited *Nathan* v. *Giles*, 5 Taunt. 558, 574, a case of a lienor in possession, and the only illustrations which it gave of nonpossessory liens which might possibly override the priority of the United States were certain maritime liens not governed by common-law rules (see *Vandewater* v. *Mills*, 19 How. 82, 89; II Jones, Liens, secs. 1676 *et seq.*) and entitled in admiralty to priority even over an earlier mortgage (*The Lillie Laurie*, 50 Fed. 219, 221 (C. C. E. D. Tex.)). In short, the proposition whose decision would "deserve very grave deliberation" was that no lien short of a conveyance would withstand the priority of the United States.

States, an asserted lien created by state statute and supported by neither title nor possession. In recent years, the Court has consistently upheld the priority of the United States over such statutory liens. *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Texas*, 314 U. S. 480. While it has done so on the ground that the liens there in question were not "specific and perfected," one consideration which has been given great weight in reaching that conclusion has been the want of title or possession in the creditor. Thus, in *New York* v. *Maclay*, 288 U. S. 290, 293–294, the lien for New York state franchise taxes was held subordinate "unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." And in *United States* v. *Texas*, 314 U. S. 480, 488, the Court ruled that Texas' lien for taxes could not prevail over the federal claim since the state law "did not of its own force divest the taxpayer of either title or possession." (See fn. 14, *infra*, p. 24.)

We submit that the landlord's lien here asserted fails to satisfy the requirement of these cases. It does not purport to divest the debtor of title or possession. And it does not even meet the criteria of a "specific and perfected lien" which this Court has announced as a *sine qua non* to the lienor's right to prevail.

In *New York* v. *Maclay*, 288 U. S. 290, the New York corporate franchise tax, which under state law was a lien upon all real and personal property of the corporation, superior to existing mortgages (*New York Terminal Co.* v. *Gaus*, 204 N. Y. 512, 514 (1912); *Carey* v. *Keith, Inc.*, 250 N. Y. 216 (1929); cf. *Marshall* v. *New York*, 254 U. S. 380, 383–384), and binding upon the property in the hands of subsequent purchasers, was nevertheless held "not so perfected or specific as to change the rule of distribution" under R. S. 3466, on the ground, among others, that the exact amount of the tax had not been ascertained so that the lien was inchoate (288 U. S. at 292–293). The Court expressly reserved the question whether the United States would be entitled to priority if the lien were specific and perfected.* Likewise, in

* The Circuit Court of Appeals for the Second Circuit had also upheld the priority of the United States (*sub nom. North River Coal & Wharf Co.* v. *McWilliams Bros., Inc.*, 59 F. (2d) 979, 981), saying:

> While it is clear that in the present case the taxes due the state of New York prior to the receivership were a general lien upon the real and personal property of the defendant at the time when the receivers were appointed, the question is not whether these taxes are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government.
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> * * * * * *
>
> In view of the sweeping provisions of Rev. St. § 3466, (31 U. S. C. A. § 191), it seems unlikely that it was intended to allow the mere statutory declaration by a state of a general lien to give the latter a preference over debts and taxes due the government. Neither the decisions

United States v. *Knott*, 298 U. S. 544, the claim of the United States was held superior as to securities deposited with the State Treasurer of Florida to secure claims of creditors there. Although specific property was thus outside the debtor's possession and pledged to secure a particular class of claims, the lien was held not to be "specific and perfected" because the identity of the creditors entitled to resort to the securities was not established at the time when the priority of the United States attached.

Certainty as to the amount due, however, is not enough. Even where the amount of the tax had been definitely ascertained and liquidated prior to the accrual of the priority of the United States, the Court of Appeals of New York, in *Matter of Lincoln Chair & Novelty Co.*, 274 N. Y. 353, 358 (1937), held that the tax lien remained general and unperfected insofar as R. S. 3466 was concerned, because no specific property had been seized or appropriated and set apart from the general property of the debtor for the satisfaction of the tax. (See also *People of New York* v. *United States*, 106 F. (2d) 210, 212 (C. C. A. 3); *Gerson* v. *Shubert Theatre Corp.*, 7 F. Supp. 359 (S. D. N. Y.).) And in *United States* v. *Texas*, 314 U. S. 480, while the Court emphasized

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of the Supreme Court nor the specified priorities allowed third parties under Rev. St. § 3186 as amended (26 U. S. C. A. § 115) indicate that section 3466 is subject to any such limitation. * * *

the fact that the amount of the gasoline tax liability secured by the lien was "unliquidated and uncertain," it also pointed out (314 U. S. 480, 487, 488) that the property subject to the lien was "neither specific nor constant" and that the lien was not self-executing and "could not be enforced without the assistance of the [state] courts."

We submit that the landlord's lien here asserted is insufficiently specific to prevail under the rule of these cases. The Virginia Code authorizes a landlord to levy distress for six months' rent upon "any goods of the lessee * * * found on the premises" or removed from them not more than 30 days prior to the levy (Va. Code of 1936, Sections 5519, 5523; see Appendix, *infra*, pp. 29–31). In addition, it provides that the goods of the tenant on leased premises in a city or town (as was the case here) may not be removed by a lienor or purchaser, nor taken under legal process, save "on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due," not to exceed six months' rent. (Va. Code, Section 5524; Appendix *infra*, p. 31).[9]

[9] Section 5524 appears as Sections 5 and 6 of Chapter 15 of the Act of 1748 (Virginia Laws 1752, p. 292), and has been continued in the successive revisions of the Virginia Code. 1 Va. Rev. Code (1819), p. 448; Va. Code (1887) sec. 2792; Va. Code (1919) sec. 5524; Va. Code (1942) sec. 5524. It was derived from the Act of 8 Anne c. 14, sec. 1. See 1 Va. Rev. Code (1819) p. 448; *American Exchange Bank* v. *Goodlee R. Corp.*, 135 Va. 204, 212–215 (1923). In its original form, it

The Supreme Court of Appeals of Virginia held that Section 3524 creates a lien, effective as of the date the tenancy commenced, without the necessity for any further proceeding by distress, attachment, or otherwise. That holding on a proposition of state law is, of course, controlling here. But the question whether the lien is sufficiently "specific and perfected" to override the statutory priority of the United States is a question of federal law as to which the characterization given by the state court cannot control. The states may not establish a priority in conflict with that prescribed by Section 3466. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 90; *United States* v. *Emory*, 314 U. S. 423, 426–427; cf. *Michigan* v. *United States*, 317 U. S. 338, 340. Accordingly, we look not to the characterization given the lien by the Virginia court in the present case, but to the actual rights and powers conferred by the lien upon the parties as declared by the state courts.

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applied only where the goods were taken on "execution or on any pretence whatsoever" (the word "or," which does not appear in the English statute, has been said to be a typographical error, *American Exchange Bank* v. *Goodlett R. Corp.*, *supra*, 214). The Code of 1887 extends the landlord's right to cases where a lien is asserted on a tenant's property, and in the revision of 1919 a prohibition against removal of the goods by "purchasers" was expressly included, the revisers' note stating that this was thought merely to express more clearly the effect of the Section as it stood.

When so measured, the lien lacks specificity in several respects:

1. *The debt secured is not specific.*—The lien attaches not for the rent due during a particular six months' period, but for rent which may happen to be due at or after the time when the lien is asserted (see *Wades* v. *Figgatt*, 75 Va. 575, 582 (1881)), and where the assertion of the lien is not based upon the levy of a distress, that time is selected by someone other than the landlord. The amount of the debt secured is not specific either; there may be dispute as to the rate of rental prescribed (*e. g.*, *Hagan* v. *Callas*, 139 Va. 137 (1924)), and in any event the amount secured will depend upon whether at the time the lien is asserted the tenancy has terminated or will terminate within six months of the date to which the rent has been fully paid. Moreover, the amount of the debt secured by the lien or for which distraint may be made may be subject, prior to distraint, to the right of the tenant to a set-off. Cf. *Hancock* v. *Whitehall, Etc. Co.*, 100 Va. 443, 447 (1902). Thus, as in *United States* v. *Texas*, 314 U. S. 480, 487, 488, the amount of the debt for which the lien is a security "is left to determination by the courts"; the lien "could not become specific until the exact amount of the [debt] due had been determined."

2. *The goods subject to the lien are not specific.*—The lien extends to the tenant's interest in whatever goods he may bring onto the premises, including goods brought there after the beginning of

the tenancy (cf. *Dingess-Rum Coal Co.* v. *Draper Eagle Coal Co.*, 108 W. Va. 37 (1929))—a matter as to which the landlord usually has neither knowledge nor control. It does not prevail over a purchase-money mortgage or any other lien which attached before the goods were brought on the premises. Va. Code, Secs. 5523–5524, Appendix, *infra*, pp. 30–32. The Virginia statute prohibits removal only by a lienor or purchaser;[10] nothing in it would appear to prevent the tenant, or any other person, from removing whatever goods he may choose. When goods are removed from the premises, whether in violation of the statute or not, it does not appear that the landlord can follow the goods.[11] In any event, the landlord can neither seize nor sell the tenant's goods save by the process of distraint provided by the statute.

[10] It has been indicated that property sold by a merchant in the ordinary course of business is not subject to this provision. *American Exchange Bank* v. *Goodlet R. Corp.*, 135 Va. 204, 222 (1923).

[11] The landlord may, under other provisions of the statute, distrain within 30 days as if the goods had not been removed (Va. Code, Sec. 5523)—a right which exists regardless of whether the removal of the goods was in violation of Section 5524. But once the goods have been removed from the premises, whether or not the right of distraint remains, the landlord cannot prevail over an attaching creditor. *Geiger's Adm'r* v. *Harman's Ex'r*, 44 Va. 130 (1846); *Mosby* v. *Leeds*, 3 Call. 439 (7 Va. 380) (1803); *Dime Deposit Bank* v. *Wescott*, 113 Va. 567 (1912). Aside from the right of distraint, his only remedy would appear to be a personal action for damages against a purchaser or lienor who removed goods in violation of Sec. 5524 *American Exchange Bank* v. *Goodlet R. Corp.*, 135 Va. 204 (1923); *Kelly* v. *Worsham*, 160 Va. 275 (1933).

(Va. Code, Secs. 5519–5523), which is a "proceeding * * * judicial in * * * character." *Wickham* v. *Richmond Spike Co.*, 107 Va. 44, 49 (1907). The distress warrant is returnable in court (Va. Code, Sec. 5528), and the tenant has the opportunity to make any defense to the distraint (Sec. 6519) and thus to secure judicial trial of the amount of rental due (*Hogan* v. *Callas*, 139 Va. 137 (1924); cf. *Garfein* v. *Howell*, 142 Va. 197, 201 (1925)) and to claim any right of set-off (*Hancock* v. *Whitehall, Etc. Co.*, 100 Va. 443, 447 (1902)). Only sufficient goods may be distrained to satisfy the rent justly believed due, and the tenant has an action for damages, comparable to an action for trespass, for excessive distraint (Va. Code, Sec. 5783; *Fishburne* v. *Engeldove*, 91 Va. 548 (1895); cf. Va. Code, Sec. 5527), thus indicating that the lien is inchoate and not specific and perfected.

It is apparent that the property subject to the lien here involved is no more "specific and constant" that was the state lien on the "property devoted to or used in [the debtor's] business as a distributor," which was involved in *United States* v. *Texas*, 314 U. S. 480, 487. The amount of the debt secured is not fixed. And not until distraint by the landlord does the lien attach to specific goods in a specific amount so as to enable the landlord to satisfy his claim out of them. Prior to distraint, the "lien" is merely a right to pre-

vent removal of the goods from the premises by certain classes of persons, and a right under state law to priority in distribution so long as the goods remain on the premises. In short, as in *United States* v. *Texas*, 314 U. S. 480, 488, the lien in question "did not of its own force divest the [debtor] of either title or possession * * * and it could not be enforced without the assistance of the courts." Until such enforcement, it amounts to no more than a state statutory declaration as to the order of payment of creditors, which cannot override the inconsistent declaration of R. S. 3466.[12]

Thus, the landlord's lien conferred by Virginia law does not appear to differ essentially from the

[12] The fact that a landlord's lien, where created by state law, is considered to come within section 67f of the Bankruptcy Act, thereby taking ahead of any of the priorities given by section 64a thereof (*e. g.*, *In re Brannon*, 62 F. (2d) 959 (C. C. A. 5); *Bradford* v. *Graham*, 287 Fed. 686 (C. C. A. 4); *Grant Co.* v. *Snead*, 37 F. (2d) 705 (C. C. A. 4)), has no significance in a proceeding under R. S. 3466. Under the bankruptcy statute, the claims of the United States for taxes and other debts are subordinate under section 67f of that statute to those of the states or individuals secured by general liens. *U. S. F. & G. Co.* v. *Sweeney*, 80 F. (2d) 235 (C. C. A. 8); *Claude D. Reese, Inc., v. United States*, 75 F. (2d) 9 (C. C. A. 5); cf. *City of New Orleans* v. *Harrell*, 134 F. (2d) 399, 402 (C. C. A. 5). General liens, of course, are subordinate to the priority of the United States under R. S. 3466. *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maday*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480; *United States* v. *Reese*, 131 F. (2d) 466, 469–470 (C. C. A. 7). The two Acts are not *in pari materia*. *United States* v. *Emory*, 314 U. S. 423, 428–429.

statutory lien for corporation license taxes considered by this Court in *New York* v. *Maclay*, 288 U. S. 290, or from the lien for gasoline taxes involved in *United States* v. *Texas*, 314 U. S. 480. In both those cases, the state taxes, as a matter of state law, were paramount and superior to all other liens, including the lien created by pre-existing mortgages. They failed in the contest of priority with the United States because, as was pointed out in the latter case, they did not of their own force divest the taxpayer of either title or possession, or because they were not so "specific and perfected" against an identifiable chattel as in effect to divest the property from the debtor's estate. We believe that similar considerations here obtain to subordinate the Virginia statutory lien.

II

THE LIEN OF THE CITY OF DANVILLE FOR TAXES IS NOT ENTITLED TO PRIORITY AS AGAINST THE CLAIM OF THE UNITED STATES

The Corporation Court of the City of Danville held that the taxes due the City of Danville were a specific lien on the furniture and equipment superior to the claim of the United States (R. 33–34). The Supreme Court of Virginia did not decide whether this tax lien was sufficiently "specific and perfected" to override the claim of the United States, since it found that the landlord's claim would exhaust the available fund (R. 43).

If, as we contend, this ruling as to the landlord's priority was error, the relative priorities of the United States and the city become pertinent.

In awarding priority to the city, the Corporation Court apparently recognized that the municipal tax confers a lien on a specific chattel, capable of following it wherever it may be, only if specifically assessed on that chattel (*Drewry* v. *Baugh and Sons*, 150 Va. 394, 401 (1928); *Chambers* v. *Higgins*, 169 Va. 345, 351–352 (1937)), and that otherwise the right of the tax collector is merely a right to distrain.[13] But it does not appear that each item of furniture was assessed separately. The holding of the Corporation Court was, by analogy to the requirement of description in a chattel mortgage (see *Williamson* v. *Payne*, 103 Va. 551 (1905)), that assessment of the furniture and equipment as a unit was sufficient to establish a specific lien upon them as a unit "so long as they remained on the premises * * *. Had they been divided and removed therefrom no doubt different results would have followed" (R. 34).

[13] This right is made superior to a mortgage lien by Section 381 of the Va. Tax Code, but is inferior to the lien of an execution. *Drewry* v. *Baugh and Sons*, 150 Va. 394 (1928). It may be noted that both the landlord and the city thought that judicial proceedings were necessary to make their liens specific and perfected. Both distrained or attached (see Statement, *supra*, p. 4). Indeed, the landlord claimed priority solely because of the levy of the attachment and distress warrant (R. 22).

We submit that such a lien, accompanied by neither title nor possession, which attaches to the furniture and equipment only for so long as it remains on the premises as a unit, is not, as a matter of federal law, sufficiently specific and perfected to defeat the priority of the United States. The lien for the city's taxes appears to be similar in general character to the lien for state taxes considered in *New York* v. *Maclay*, 288 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480, which were held to be subordinate to the Federal Government's claim (see pp. 13, 14, 15–16, 18, 20–22, *supra*).[14]

III

RECOGNIZING LIENS OF THE CHARACTER INVOLVED IN THE INSTANT CASE AS SUPERIOR TO THE PRIORITY CONFERRED ON THE UNITED STATES BY R. S. 3466 WOULD IMPROPERLY PERMIT STATES TO SUBSTITUTE THEIR OWN PRIORITY SCHEME FOR THAT DIRECTED BY CONGRESS

As this Court reaffirmed in *United States* v. *Emory*, 314 U. S. 423, 426, the purpose of Section 3466 is "to secure adequate public revenues to sus-

[14] State courts have recognized that state statutory liens for taxes, when unaccompanied by a change of title or possession, must yield to the priority established by R. S. 3466. *West Coast Power Co.* v. *So. Kansas Gas Co.*, 20 Del. Ch. 130, 131 (1934); *Matter of Lincoln Chair & Novelty Co.*, 274 N. Y. 353 (1937); *Decker* v. *Decker Building Material Co.*, 118 N. J. Eq. 177, 179 (1935); *Spokane Merchants' Ass'n* v. *State*, 15 Wash. (2d) 186, 188–189 (1942); cf. *Tropical Printing Co.* v. *Union Title Guarantee Co.*, 180 La. 702, 730–732 (1934).

tain the public burden" (*United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35), and it is to be construed liberally in order to effectuate that purpose (*Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 487). This Court likewise has repeatedly stated that states are without power to establish a priority in conflict with that prescribed by Section 3466 (*Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 90; cf. *Michigan* v. *United States*, 317 U. S. 338, 340). The decision below, we submit, by substituting the state order of priority of payment for that established by R. S. 3466, reaches a result at variance with the imperative language of that Section and the controlling decisions of this Court.

It is, of course, clear that should a state statutory lien, unaccompanied by either title or possession, be held superior to a claim of the United States, it would be possible for a state, by the simple expedient of characterizing certain classes of claims as liens, to substitute its own conception of priority in cases of insolvency for that of Congress. Attempts of states to procure prior payment of their taxes in this manner have been rejected by this Court in the *Spokane County*, *Maclay*, and *Texas* cases. (See also fn. 14, *supra*, p. 24.) The results in those cases accord with the repeated statements of this Court that the

benefits of a federal statute may not be evaded or denied by state statutes or common-law rules. *E. g., Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176; *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95.

It is only when the debtor becomes insolvent that a statutory lien assumes stature. The lienee then becomes entitled to priority in payment out of the assets charged with the lien. *Piedmont Corp.* v. *Gainesville & N. W. R. Co.*, 30 F. (2d) 525, 530 (N. D. Ga.). A state statute providing for priority of payment to certain classes of debts accomplishes the same ultimate result as a statutory lien. Yet state laws granting priority in payment must yield to the priority conferred by R. S. 3466. We submit that a state cannot achieve the same result by indirection. Whether it uses the terminology of lien, or that of priority in distribution, a state cannot by mere statutory declaration override the command of R. S. 3466 as to the priority of the United States over other creditors.[13]

This principle applies to the landlord's lien here in question. In those states which follow the common-law rule, no lien arises until dis-

[13] Thus, the attempts of states to prefer wage claims by a statutory declaration of priority (*Emory* v. *St. James Distillery*, 143 S. W. (2d) 318 (Mo. Ct. of Apps., 1940), reversed, *United States* v. *Emory*, 314 U. S. 423) or by statutory lien (*Ernst* v. *Guarantee Millwork, Inc.*, 200 Wash. 195 (1939), overruled *sub silentio*, *Spokane Merchants Ass'n* v. *State*, 15 Wash. (2d) 186 (1942), were alike unsuccessful in view of R. S. 3466.

traint, which of course effects a change in possession.[16] In other states, by statutory *ipse dixit*, the landlord has a paramount lien by reason of the relationship of landlord and tenant alone. We do not perceive that a state statute which merely provides that such a lien shall be paramount to all other claims (with the usual exception of state and municipal tax liens) changes the inherent nature of the claim or raises its character to that of a specific and perfected lien, entitled to prevail over the priority of the United States. Moreover, it may frequently result, as in the instant case, in enabling state or municipal taxes otherwise uncollectible, owing to the insolvent condition of the debtor and the priority accorded by R. S. 3466, to be paid in full. Cf. *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232 (1924); *State* v. *Wynne*, 134 Tex. 455, 471 (1940).

Accordingly, we maintain that the state statutory liens here in question, which are not specific, and do not divest the debtor of either title or possession, are incapable of defeating the priority of the United States under R. S. 3466, no matter how such liens may be characterized as a matter of state law.

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[16] As the court below remarked (R. 40): "At common law the landlord had no lien upon any property of his tenant as security for rent prior to the levy of a distress warrant. 31 Am. Jur., Landlord and Tenant, Sec. 564, p. 461, and authorities there cited." Cf. *In re West Side Paper Co.*, 162 Fed. 110 (C.C.A. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed and the case remanded with direction that the debt due the United States be the first paid.

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APPENDIX

Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191) provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Virginia Code of 1936 provides:

> § 5519. REMEDY FOR RENT AND FOR USE AND OCCUPATION.—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefor be non-suited, but may use the same as evidence of the amount of his debt or damages. In any

action for rent, or for such use and occupation, interest shall be allowed as on other contracts. (Code 1887, § 2787.)

* * * * *

§ 5522. WHEN AND BY WHOM DISTRESS MADE.—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed. (Code 1887, § 2790; 1902–3–4, p. 664.)

§ 5523. ON WHAT GOODS LEVIED.—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress,

but for not more than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming, or agriculture, and for not more than twelve months' rent if the lands or premises are used for farming or agriculture whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. (Code 1887, § 2791; 1922, p. 863; 1932, p. 696.)

§ 5524. WHEN GOODS NOT TO BE REMOVED WITHOUT PAYING SIX MONTHS' RENT; LIEN FOR TAXES, LEVIES, AND MILITIA FINES NOT AFFECTED.—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used

for residential purposes, and not for farming or agriculture, and not being more altogether than twelve months' rent, if the lands or premises are used for farming or agriculture. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

For the purpose of this act a monthly or weekly tenancy shall not be construed as a new lease for every month or week of occupation of the premises by the tenant, but his tenancy shall be considered as a continuance of his original lease so long as he shall continue to occupy the property without making any new written lease. (Code 1887, § 2792; 1922, p. 863; 1932, p. 696.)

§ 5527. WHEN DISTRESS NOT UNLAWFUL BECAUSE OF IRREGULARITY, ETC.—Where distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser ab initio; but the party aggrieved by such irregularity or unlawful act may, by action, recover full satisfaction for the special

damage he shall have sustained thereby. (Code 1887, § 2794.)

§ 5528. RETURN OF DISTRESS WARRANTS; PROCESS OF SALE THEREUNDER.—It shall be the duty of each officer who, under the present law may execute warrants of distress, except where it is otherwise provided by law, to make return of his action and proceedings upon such warrants as may be placed in his hands for collection, and file the same with the clerk of the circuit or corporation court of his county or city, as the case may be, except in the city of Richmond the same shall be filed with the clerk of the circuit court, or the clerk of the law and equity court, or the clerk of the law and equity court, part two, within sixty days after the same may have come to his hands, upon the return of such warrant it shall be the duty of such clerk to enter the same upon the execution book of his office after the manner as now provided by law as to executions issued by justices and returned unsatisfied, and the said clerk shall preserve such warrant in his office as is now provided as to such unsatisfied executions. If such return shall show that a levy has been made and that property levied on remains unsold, it shall be lawful for the said clerk of the court in whose office such return is filed to issue a writ of venditioni exponas thereon just as if the said return were upon a writ of fieri facias. (1897–8, p. 755; 1930, p. 456).

* * * * *

§ 5783. FOR WRONGFUL DISTRESS, ETC.—If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such

property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful seizure, and also, if the property be sold, for the sale thereof. (Code 1887, § 2898.)

* * * * *

§ 6518. WHEN AND HOW FORTHCOMING BOND MAY BE TAKEN; PROPERTY THEN REMAINS IN DEBTOR'S POSSESSION.—The sheriff or other officer levying a writ of fieri facias, or distress warrant, may take from the debtor a bond, with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon (including his fee for taking the bond, commissions, and other lawful charges, if any), with condition that the property shall be forthcoming at the day and place of sale; whereupon, such property may be permitted to remain in the possession and at the risk of the debtor. (Code 1887, § 3617.)

§ 6519. HOW TENANT UNABLE TO GIVE FORTHCOMING BOND MAY HAVE DISTRESS WARRANT RETURNED TO COURT AND MAKE DEFENSE THERETO; WHEN OFFICER, IN SUCH CASE, TO TAKE POSSESSION OF PROPERTY LEVIED ON; ITS SALE, WHEN PERISHABLE OR EXPENSIVE TO KEEP.—On affidavit by a tenant, whose property has been levied on under a warrant of distress, that he is unable to give the bond required in the preceding section, and that he has a valid defense under section sixty-five hundred and twenty-two, the officer levying the warrant shall permit the property to remain in the possession and at the risk of the tenant, and shall return the warrant, together with the affidavit, to

the first day of the next term of the circuit court of his county or corporation court of his corporation, and thereupon the landlord after ten days' notice in writing to the tenant, may make a motion before such court for a judgment for the amount of the rent and for a sale of the property levied on, as aforesaid, to which motion the tenant may make such defense as he is authorized to make, under section sixty-five hundred and twenty-two, to an action or motion on the bond where one is given. If, however, after such affidavit is made, the claimant of the rent, or some one for him, shall give bond with sufficient surety, in a penalty double the value of the property levied on, with condition to pay all costs and damages which may accrue to any one by reason of his suing out said warrant, the officer shall take possession of the property and hold the same subject to the order of the court. If the property be perishable, or expensive to keep, the court, or the judge thereof in vacation, may order it to be sold, and on the final trial of the cause, the court shall dispose of the property, or proceeds of sale, according to the rights of the parties. (Code 1887, § 3618; 1902–3–4, p. 839.)

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